No. 93-1911

(8)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility, Hawaii,

Petitioner,

vs.

DEMONT R. D. CONNER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EDWIN F. MANDEL LEGAL AID CLINIC IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae is the Edwin F. Mandel Legal Aid Clinic, a legal services and clinical education program in Chicago. The Clinic provides services to low income persons and is jointly operated by the University of Chicago Law School and the Legal Aid Bureau of the United Charities of Chicago. The *amicus curiae* files this Brief in support of the position of Respondent DeMont R.D. Conner.

The Clinic provides services to prisoners who are suffering from mental illness or have been found not guilty by reason of insanity. The Clinic also has represented prisoners in establishing that there is a state-created liberty interest in parole in Illinois. The impact of prison discipline including solitary confinement on parole will affect current and future clients of the Clinic.

SUMMARY OF THE ARGUMENT

Hawaii's prison disciplinary regulations limiting the prison's discretion in sentencing an inmate to punitive solitary confinement create a liberty interest under the Fourteenth Amendment's Due Process Clause.

Hawaii prison disciplinary regulations are substantially identical to the statute at issue in *Wolff*. Hawaii provides substantive predicates by listing seventy-three specific offenses, and five catch all categories of any other criminal acts under the Hawaii Penal Code. The disciplinary regulations use mandatory language that a "finding of guilt shall be made where" an inmate is guilty of a specific violations. Further, the regulations require that the prison must follow unmistakably mandatory procedures in determining whether the inmate is guilty of the specific violation charged. Solitary confinement is the most severe punishment the prison can impose only after finding the

inmate guilty of the specific violation. The regulations also set forth substantive predicates for determining the sanction.

Petitioner's interpretation of the regulations to provide unfettered discretion, not constrained by substantive predicates, is an unconstitutional restriction on Hawaii's state created liberty interest. This interpretation violates the Fourteenth Amendment doctrine of the "bitter with the sweet" prohibiting a state from taking away the state created liberty interest by providing inadequate procedures. To interpret the regulations so that the second step of review by the administrator defeats the liberty interest violates this Court's longstanding rejection of the concept that you "must take the bitter with the sweet."

The principle of *stare decisis* requires the retention of the rule recognizing state created liberty interests in freedom from solitary confinement. Numerous decisions have

relied upon and applied the rule the court first announced in *Wolff*. No justification has been shown for overruling this Court's 20 year old precedents recognizing that states can create liberty interests in freedom from disciplinary confinement and loss of goodtime.

None of the "prudential and pragmatic considerations" justify any departure from *stare decisis*. Neither the briefs of Petitioner nor the *amici* in support of Petitioner show that requiring some procedural safeguards attendant to imposition of solitary confinement is unworkable. Also, scholars of prison administration favor procedural safeguards for serious prison disciplinary actions and have demonstrated the salutary effects of procedural fairness on prison peace and safety. Petitioner's concerns regarding the impact on prison discipline are more appropriately addressed in the procedural balancing that occurs under *Mathews v.*

Eldridge, 424 U.S. 319, 335 (1976), after the determination of a liberty interest.

The factual premises concerning the severity of the deprivations caused by solitary confinement remain true today. Solitary confinement is clearly a serious punishment. The American Correctional Association considers disciplinary segregation as a last resort punishment for serious violations, and may "only occur after an impartial hearing has established that there was a serious violation of conduct regulations and that there is no adequate alternative disposition to regulate the inmate's behavior." American Correctional Association, Standards for Adult Correctional Institutions 126 (1981). Further, all parole authorities rely upon prison disciplinary records in parole decisions. It is considered an important factor in deciding parole, and parole agencies must have confidence in the

disciplinary decisions made by prison administrators.

The ability of prison authorities to impose administrative segregation upon inmates does not remove the liberty interest of inmates in avoiding punitive segregation. This Court has held that virtually identical forms of confinement may be classified as punitive or non-punitive based upon the government's intent. When a prison chooses to punish an inmate with solitary confinement for violating prison rules, the Due Process Clause requires it to provide appropriate procedural protections.

ARGUMENT

I. HAWAII PRISON REGULATIONS CREATE A LIBERTY INTEREST BY USING MANDATORY LANGUAGE IN CONNECTION WITH SPECIFIC SUBSTANTIVE PREDICATES.

Nothing has changed in the last twenty years to justify departure from this Court's recognition that placement in solitary confinement can be a state-created liberty interest. Hawaii's statutes and regulations are nearly identical to provisions which this Court has found to create liberty interests. Petitioner and the *amici curiae* in support of Petitioner implicitly concede that to rule in their favor, this Court would have to overrule its precedent. No justification exists for such a drastic curtailment of freedom under the analytic framework of *stare decisis*. The infliction of punitive solitary confinement with its severe restrictions upon the inmate's conditions of confinement, and its collateral consequence of adversely affecting parole, imposes sufficient deprivations to require a

liberty interest under the state-created liberty analysis.

A. This Court's Longstanding Recognition Of A Liberty Interest In Not Being Punished By Solitary Confinement Applies To The Hawaii Prison Regulations.

This Court was right to recognize that states can create liberty interests protected under the due process clause of the Fourteenth Amendment of the U.S. Constitution. The punishment of solitary confinement that the prison officials imposed on DeMont Conner is the exact deprivation that this Court protected by requiring due process in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Disciplinary solitary confinement of an inmate is the most severe punishment Hawaii imposes on inmates. Because of its severity, solitary confinement cannot be imposed for longer than sixty days without specific additional procedures. While in solitary, an inmate is confined in a small cell for all but six hours per week. In the brief time out of

the cell, the inmate has no contact with other inmates, and is shackled with leg irons and waist chains. Guards strip search inmates upon both leaving and returning to the cell. Almost all possessions are banned, including radios and televisions. Disciplinary segregation also has severe collateral consequences. There is a stigma that comes with punishment, and the guards may brand the inmate a troublemaker and inflict further punishments. Finally, the inmate's years in prison will be longer because parole will likely be delayed.

Hawaii prison disciplinary regulations are substantially identical to the statute at issue in *Wolff*, and meets the requirements for a state created liberty interest by the use of mandatory language in connection with substantive predicates that must be present before an inmate may suffer a serious loss. Hawaii provides substantive predicates by listing seventy-three specific offenses, and

five catch all categories of any other criminal acts under the Hawaii Penal Code. The disciplinary regulations use mandatory language that a "finding of guilt shall be made where" there is substantial evidence an inmate committed a specific violation. The regulations require that the prison must follow unmistakably mandatory procedures in determining whether the inmate is guilty of the specific violation charged. Solitary confinement is one of the punishments the prison can impose only after finding the inmate guilty of the specific violation.

In 1974, this Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), first announced that the due process clause required that an inmate be afforded procedural protections in prison disciplinary hearings before the inmate could be punished by loss of goodtime credits or placement in solitary confinement. *Wolff* recognized that the state created a liberty interest in remaining free

from solitary confinement, because the state mandated that an inmate must only be punished by placement in solitary confinement after the inmate was found guilty of serious misconduct. *Id* at 558.

The Court has interpreted *Wolff* to require examination of procedural due process questions by first asking whether a liberty interest exists. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)(citations omitted). If a liberty interest exists, then the Court determines what processes are due before the state may deprive the individual of the liberty interest. *Id.* State laws create protected liberty interests in prisons by establishing substantive limitations on official discretion. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). "The repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has

created a protected liberty interest." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983). The Hawaii regulations governing disciplinary proceedings contain the requisite mandatory language in connection with substantive predicates.

Although this Court did not expressly describe *Wolff* and its progeny in the "mandatory language in connection with substantive predicates" formulation, it was implicit in the decisions. *Thompson*, 490 U.S. at 463. The Court found that the statute created a liberty interest because the statute mandated that inmates "can only lose good-time credits if they are guilty of serious misconduct." *Wolff*, 418 U.S. at 558. Hawaii's disciplinary regulations clearly create a liberty interest under this Court's longstanding test. The regulations use mandatory language that the committee shall find guilt if there is substantial evidence of the offense. Haw. Admin. R. § 17-201-18.

There is also mandatory language used in connection with the procedures required to establish the substantive predicate of the inmate's guilt of "misconduct." Both must be followed before the inmate can be placed in solitary confinement.

B. Hawaii Prison Disciplinary Regulations Contain The Requisite Substantive Predicates To Create A Liberty Interest In An Inmate Not Being Punished By Solitary Confinement.

The Hawaii prison disciplinary regulations contain substantive predicates of specific acts of serious misconduct that may result in punishment of an inmate by solitary confinement. Haw. Admin. R. § 17-201-6(a). The seventy-three substantive predicates of "misconduct" are divided into five categories – greatest, high, moderate, low moderate, and minor – with each category containing a catchall violation of any other criminal act under the Hawaii Penal Code. The regulations provide specific punishments for each category, with a maximum punishment of sixty

days in solitary confinement. Haw. Admin. R. §§ 17-201-6 through 17-201-10. By way of example, the substantive predicates in Haw. Admin. R. § 17-201-6(a) include:

> (1) Sexual assault.
>
> (2) Killing.
>
> (3) Assaulting any person . . . causing bodily injury.
>
> (11) Rioting.
>
> (15) Any other criminal act which the Hawaii Penal Code classifies as a class A felony.

These specific offenses meet the Court's test of "specified substantive predicates" that must be proven before an inmate is punished. In *Wolff*, the substantive predicates of serious misconduct included "assault, escape, attempt to escape." 418 U.S. at 547. The Hawaii list of offenses contain these three substantive predicates mentioned in *Wolff*: (1) Assault, § 17-201-6(a)(3); (2) Escape, § 17-201-6(a)(3); and (3) Attempting escape, § 17-201-6(a)(3). The

Hawaii regulations also contain a much more detailed listing of the criminal offenses that constitute the substantive predicates.

The substantive predicates in the Hawaii list of offenses are much more "specified" than other substantive predicates this Court has recognized. This Court has found a liberty interest in not being confined in administrative segregation in its summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978) summarily aff'd, 462 F.Supp 397 (ND Cal. 1976). The substantive predicate was a reasonable belief that the inmate was "a menace to themselves and others or a threat to security." *Wright*, 462 F.Supp at 403. Similarly, in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979), the Court recognized the substantive predicate of an inmate's "release would depreciate the seriousness of his crime or promote disrespect for law." The statute required the Board of

Parole to order an inmate's release unless the Board found the substantive predicate.

This Court, in *Vitek v. Jones*, also found that mandatory language in connection with substantive predicates created a liberty interest in an inmate not being involuntarily transferred to a mental hospital. 445 U.S. 480, 489-90 (1980). The substantive predicate required was the finding of a mental illness that could not be adequately treated in the prison. *Id* at 489-90. Similarly, in *Hughes v. Rowe*, this Court recognized that state law prevented an inmate from being placed in segregation unless the substantive predicate of a showing of "institutional security or safety" was proven in a prior hearing. 449 U.S. 5, 12 (1980). The Hawaii list of offenses clearly qualify as substantive predicates under this Court's precedents.

In *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court put to rest any doubts about the mandatory language in connection with

substantive predicates formulation of liberty interests. The substantive predicates of "the need for control" or "the threat of serious disturbance" created a liberty interest. *Id* at 471-72. Finally, in *Board of Pardons v. Allen*, 482 U.S. 369 (1987), this Court held that Montana law mandated an inmate's release on parole when there existed the substantive predicate of a reasonable probability that the inmate could be released without detriment to the inmate or the community.

The substantive predicates of specific offenses in the Hawaii disciplinary regulations are much more certain and specific than those this Court has previously recognized. The cases discussed above require the conclusion that the requisite substantive predicates are present in the Hawaii disciplinary regulations.

C. Hawaii Prison Disciplinary Regulations Create A Liberty Interest By Containing Relevant Mandatory Language In Connection With Specified Substantive Predicates.

For over twenty years, this Court has consistently held that a statute that uses mandatory language in connection with the establishment of specified substantive predicates creates a liberty interest. This Court most recently expressed the mandatory language standard in *Kentucky Dept. of Corrections v. Thompson*: "the use of explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a liberty interest." 490 U.S. 454, 463 (1989) (citing *Hewitt*, 459 U.S. at 472) (internal quotations omitted).

The Hawaii prison disciplinary regulations contain the required relevant mandatory language. First, the regulations contain the requisite mandatory language in

requiring the adjustment committee to make specific findings. The regulations provide that "disciplinary action shall be based upon more than mere silence." Haw. Admin. R. § 17-201-18(b). Also, "a finding of guilt shall be made where . . . the charge is supported by substantial evidence." *Id.* The Hawaii regulations contain the mandatory language in connection with requiring the substantive predicates before the imposition of punishment by solitary confinement.

Second, the Hawaii disciplinary regulations contain mandatory language requiring that specific procedures must be followed in establishing the substantive predicates. The use of "language of unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed" goes beyond simple procedural guidelines, and creates a protected liberty interest. *Hewitt*, 459 U.S. at 471-72. The Hawaii regulations require that the inmate

shall receive prior written notice of the hearing and the charges against him. Haw. Admin. R. § 17-201-16. The inmate shall have the opportunity to review all relevant non-confidential reports. *Id.* The inmate has a right to appear at the hearing and shall be given an opportunity to respond to and present evidence. Haw. Admin. R. § 17-201-17. The sanctions rendered by the adjustment committee are required to be "commensurate with the gravity of the rule and the severity of the violation." Haw. Admin. R. § 17-201-19(a). The language in the Hawaii disciplinary regulations requiring mandatory procedures is directly relevant to the determination of whether the substantive predicates are present, and create a liberty interest.

Petitioner contends that the Hawaii prison disciplinary regulations only provide procedural protections, and that those alone cannot create a liberty interest. Pet. Br. at 43-45. This contention misstates what the

regulations require. The Hawaii prison disciplinary regulations require that if an inmate commits the substantive predicate of "misconduct," defined by a list of specific offenses including sexual assault, killing and rioting, he shall be found guilty. The fact that the regulations also require that the substantive predicate of misconduct be determined by specific procedures, including a specific standard of proof, only further "demands a conclusion that the state has created a liberty interest." *Hewitt*, 459 U.S. at 472. Substantive predicates combined with a burden of proof of substantial evidence create more than an "abstract desire or interest." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982). The specific procedural requirements and the burden of proof requirement in the Hawaii disciplinary regulations give increased content to the fettering of the discretion of the adjustment committee.

Hawaii's disciplinary regulations mandate that the punishment of disciplinary segregation will not occur absent the specified substantive predicate of proof of guilt of the offense by substantial evidence after following mandatory procedures. This is identical to this Court's characterization of the state regulations in *Hewitt*. The regulation at issue in *Hewitt* provided that "[a]n inmate may be temporarily confined to [administrative segregation] . . . where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others." *Hewitt*, 459 U.S. at 471. The Court characterized the statute as having used mandatory language that certain procedures shall be followed and that administrative segregation will not occur absent the substantive predicate of the threat of serious disturbance. The Hawaii disciplinary regulations clearly create a

protected liberty interest under the test this Court has applied for over twenty years.

D. The Administrator Does Not Have Unfettered Discretion, And Even If He Did, The Unfettered Discretion Would Violate Due Process.

Petitioner argues that the facility administrator has unfettered discretion to modify or overturn a disciplinary decision of the adjustment committee. Petitioner's interpretation of the regulations to provide unfettered discretion, not constrained by substantive predicates, is an unconstitutional restriction on Hawaii's state created liberty interest. This interpretation violates the Fourteenth Amendment doctrine of the "bitter with the sweet" prohibiting a state from taking away the state created liberty interest by providing inadequate procedures. In order to avoid this constitutional violation, the regulations should be given the better construction that the administrator's discretion on review is controlled by the substantive predicates and mandatory

procedures set out in the regulations to establish guilt and render sanctions.

To interpret the regulations so that the second step of review by the administrator defeats the liberty interest violates this Court's longstanding rejection of the concept that you "must take the bitter with the sweet." See *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). After state law is analyzed and a liberty interest is found, the minimum procedural requirements are a matter of federal law, and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate . . . ." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). To interpret the regulations to provide the Administrator unfettered discretion in reviewing the final decision of the adjustment committee without any procedural safeguards would not meet the procedures required to comport with due

process. Since this interpretation would at least raise serious constitutional doubts, it would violate the canon of statutory construction of reading a statute to avoid constitutional doubts. *United States v. X-Citement Video, Inc.*, No. 93-723, 1994 U.S. LEXIS 8601 *26 (November 29, 1994). Interpreting the regulation to require the administrator to review the finding of the adjustment committee based on standards the committee must apply avoids this constitutional infirmity.

Petitioner relies on *Olim v. Wakinekona*, 461 U.S. 238 (1983), for their position that discretion in the administrator prevents the creation of a liberty interest. The Hawaii regulations at issue in *Olim*, however, "place[d] no substantive limit on official discretion and thus create[d] no liberty interest . . . ." Rule IV, the regulation at issue, provided procedures related to a committee that merely made a recommendation to

the administrator of what facility to assign an inmate. *Id* at 242. The administrator was the sole decisionmaker under Rule IV, and had completely unfettered discretion to transfer the inmate, as the Supreme Court of Hawaii had held in an earlier case. *Id* at 249. Under the regulation in *Olim*, there is no decision until the administrator decides, the Committee solely issues a recommendation. However, under the Hawaii prison disciplinary regulations, the adjustment committee makes the decision, it does not issue a mere recommendation.

The administrator's role under the regulations is that of reviewing the decision of the adjustment committee. The Hawaii prison disciplinary regulations provide for two means for review of the "decision of the adjustment committee." First, the inmate has the "right to seek administrative review of the decision of the . . . adjustment committee through the grievance process." Haw. Admin.

R. § 17-201-20(a). Second, the administrator "may also initiate review of any adjustment committee decision and it shall be within the administrator's discretion to modify any committee findings or decisions." Haw. Admin. R. § 17-201-20(b). The administrator's role in the process is that of appellate review. This does not allow the administrator to circumvent the requirements in the regulations that the substantive predicate of misconduct must be demonstrated by substantial evidence.

The administrator's review is of the decision or findings of the adjustment committee. The "finding" of the adjustment committee to be reviewed is "a finding of guilt" of the substantive predicate of misconduct. "A finding of guilt shall be made where: (1) The inmate or ward admits the violation or pleads guilty; (2) The charge is supported by substantial evidence." Haw. Admin. R. § 17-201-18(b). If sanctions are rendered, they must be "commensurate with the

gravity of the rule and of the violation." Haw. Admin. R. § 17-201-19(a). The regulation goes on to state that the inmate shall be given a written summary of the findings, and the findings will set out the evidence relied upon and the reasons for the action of the committee. Haw. Admin. R. § 17-201-18(c).

The administrator's function in the process is to review the Committee's decision of whether "the charge is supported by substantial evidence." Haw. Admin. R. § 17-201-20(b). Nowhere does the regulation eliminate the requirement of a finding of guilt prior to the imposition of punishment. This more logical interpretation of the prison disciplinary regulations also avoids violating the Due Process clause of the Fourteenth Amendment.

E. Mandatory Outcomes Are Not Required To Create A Liberty Interest.

As discussed above, *Kentucky Dept. of Corrections v. Thompson* reiterated this Court's longstanding test that "the use

explicitly mandatory language in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a liberty interest." 490 U.S. 454, 463 (1989) (citing *Hewitt*, 459 U.S. at 472) (internal quotations omitted). To be relevant, the mandatory language must be connected with the existence of substantive predicates before an outcome may be imposed. There is no requirement that the outcome must be imposed.

Petitioner claims that this Court reasoning in *Thompson* went as follows: under the statute, even though "'visitors may be excluded if they fall within one of the described categories,' 'they need not be,' and hence the rules were 'not mandatory.'" Pet. Br. at 38-39 (citing *Thompson*, 490 U.S. at 463-64). This turns *Thompson* on its head. According to this Court, "[t]he search is for relevant mandatory language that expressly requires the decisionmaker to apply certain

substantive predicates in determining whether an inmate <u>may</u> be deprived of the particular interest in question." *Id* at 465 n.4. There is no requirement that the inmate <u>must</u> be deprived of the interest in question.

Stating the rule in *Thompson* as requiring mandatory outcomes is directly contrary to this Court's opinions in both *Wolff* and *Hewitt*. The statute in *Wolff* did not have a "mandatory outcome" of loss of goodtime credits, but listed a variety of punishments that the warden <u>may</u> impose for serious misconduct. *Wolff*, 718 U.S. at 545 n.5. This Court, however, found a liberty interest based on the punishment that was actually imposed. Similarly, in *Hewitt*, the statute provided that an inmate "may" be temporarily confined, not that the inmate "must" be temporarily confined. *Hewitt*, 459 U.S. at 471. Nothing in the statute mandated the outcome that the administrator place the inmate in administrative segregation if the substantive

predicates were present. The Petitioner mischaracterizes this Court's precedent by stating mandatory outcomes are required for a statute to create a liberty interest.

II. THE PRINCIPLE OF *STARE DECISIS* REQUIRES THE RETENTION OF THE RULE RECOGNIZING STATE CREATED LIBERTY INTERESTS IN FREEDOM FROM SOLITARY CONFINEMENT.

A. Numerous Decisions Have Relied Upon And Applied The Rule The Court First Announced In *Wolff*.

Stare decisis should be applied to preserve the rule first announced by this Court in 1974 in *Wolff v. McDonnell* that procedures are required when disciplinary solitary confinement is imposed. 418 U.S. at 572 n.19. The Court recognized that solitary confinement "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct."

This Court has repeatedly relied on the rule announced in *Wolff*. In 1980, in *Hughes v. Rowe*, 449 U.S. 5 (1980), the Court applied

Wolff in an 8-1 decision reversing the dismissal of a complaint. The inmate alleged that assignment to punitive segregation for two days, with neither notice of the charge nor a prior hearing, violated due process. In his concurrence, Justice White stated: "Under *Wolff v. McDonnell* a prior hearing was required for the particular disciplinary action involved here -- segregation and loss of goodtime." *Id* at 14 (citations omitted). Again in 1980, the Supreme Court in *Vitek v. Jones*, 445 U.S. 480 (1980), relied on *Wolff* to show that statutes restricting conditions of confinement create liberty interests. The Court recognized that in *Wolff* the "state created liberty interest" analysis had been applied to solitary confinement.

In 1983, then Justice Rehnquist relied on the 1978 summary affirmance in *Enomoto v. Wright*, 434 U.S. 1052 (1978), of a District Court ruling that "state law had created a liberty interest in confinement in any sort of

segregated housing within a prison." *Hewitt*, 459 U.S. at 469. Petitioner and *amici* in support of Petitioner would reverse all of these cases and the settled expectations of minimum procedural protections before an inmate is committed to solitary confinement.

B. The Considerations Of *Stare Decisis* Justify Retention Of The Rule Recognizing State Created Liberty Interests In Solitary Confinement.

This Court should follow its line of decisions recognizing that states can create liberty interests in freedom from segregation in prisons. None of the "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case," justify any departure from *stare decisis*. *Planned Parenthood v. Casey*, 505 U.S. , 112 S. Ct. 2791, 2808 (1992).

1. Requiring Due Process Before The Imposition Of Solitary Confinement Is Not Unworkable.

One consideration identified in *Casey* is whether the rule that a state created liberty interest can exist in freedom from "solitary" confinement has proven unworkable. *Id* at 2809. Neither the briefs of Petitioner nor the *amici* in support of Petitioner show that requiring some procedural safeguards attendant to imposition of solitary confinement is unworkable. Also, scholars of prison administration favor procedural safeguards for serious prison disciplinary actions and have demonstrated the salutary effects of procedural fairness on prison peace and safety.

Prior to this Court's decision in *Wolff*, the system of prison discipline was one of ill defined disciplinary offenses with little or no procedural safeguards. Robertson, Impartiality and Prison Disciplinary Tribunals, 17 N.E. J. of Crim. & Civ.

Confinement 301, 305-06 (1991). The vague language and limited procedures gave prison officials unfettered discretion in matters of discipline. DiIulio, Administering Discipline in Federal Bureau of Prisons, 3 Federal Prisons Journal 61 (1994). Over the last twenty years, a consensus has emerged in favor of providing to each prisoner written rules regarding prison discipline and the penalties for infractions. American Correctional Association, Standards for Adult Correctional Institutions 91-95; DiIulio, 3 Federal Prisons Journal at 61. Guidelines also favor providing specific procedures for adjudicating the charge and disclosing the outcome. American Correctional Association, Standards for Adult Correctional Institutions 93-95. Petitioner argues for a return to the time of unfettered discretion for the infliction of punishment without any procedural due process protections for inmates. That is a return to the pre-*Wolff* period that resulted in

deplorable conditions for prisoners and serious prison uprisings.

Petitioner's concerns regarding the impact on prison discipline are more appropriately addressed in the procedural balancing that occurs after the determination of a liberty interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The sole question this Court accepted for review is whether a liberty interest is created by Hawaii's statute and regulations. Therefore, the only issue presented is whether a liberty interest is created and any procedures at all are required under the Fourteenth Amendment due process clause; not which procedures must be provided. The State's purported interest in swift and sure punishment is to be taken into account in applying the *Mathews* balancing test to determine the specific procedures required. States can always present evidence and arguments in the balancing test under *Mathews* to try to justify lessened procedures. But

nowhere has it been shown that application of the *Mathews* test would result in no procedures whatsoever. That would be the effective result of a decision that states cannot create liberty interests in freedom from solitary confinement.

2. Elimination Of Due Process Protections Before The Imposition Of Solitary Confinement Will Cause Inequity And Unrest.

Another consideration in *Casey* is whether the elimination of state created liberty interests in freedom from solitary confinement would cause "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it." *Casey*, 112 S. Ct. at 2809. Certainly a major positive effect of recognizing that solitary confinement is a liberty interest is upon internal peace at prisons.

Procedures allow for prisoners to know the reasons for being sentenced to solitary confinement and gives them some chance, albeit

limited, to present their side to a decisionmaker rather than internalize their anger and rage. It is a fundamental precept of due process that it is unfair to punish a person for violating a rule without first notifying that person of the rules. Resource Ctr. on Correctional Law and Legal Services, Am. Bar Ass'n, Comm'n on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 13 (1974). The lack of such notice contributes to the perception that disciplinary authority will be exercised arbitrarily. *Id.* The perception of arbitrary discipline creates, or at least exacerbates, disciplinary problems. *Id.* Guards and prison administrators can rely on the procedures to calm unruly inmates by assuring them that they will know the reasons for the action and have a chance to be heard. Assuring minimum fairness and procedures before the most serious discipline of solitary

confinement is imposed may lessen disciplinary problems.

3. Due Process Protections Before The Imposition Of Solitary Confinement Is Not A Doctrinal Anachronism.

A third consideration is whether the law's growth in the intervening years (20 years since *Wolff*) has left the rule a "doctrinal anachronism discounted by society." *Casey*, 112 S. Ct. at 2809. All of the cases relied on above have been part of the ongoing recognition of state-created liberty and property interests under this Court's Fourteenth Amendment analysis. Indeed, this Court's decisions have extended state-created liberty interests to administrative segregation, *Hewitt*, 459 U.S. 460; and to transfers to mental hospitals, *Vitek*, 445 U.S. 480. Also, the Court has repeatedly rejected efforts by states to limit the procedures to be used with respect to a state-created liberty interest by rejecting the "bitter with the sweet" approach, *Vitek*.

4. Factual Premises That Formed The Basis For *Wolff's* Recognition Of Due Process Protections Before The Imposition Of Solitary Confinement Have Not Changed.

A fourth consideration is whether the factual premises underlying the Court's recognition of a liberty interest in not being sent to solitary confinement as punishment have changed. The factual premises concerning the severity of the deprivations caused by solitary confinement remain true today. Solitary confinement is clearly a serious punishment, and one that all states use for disciplining prisoners. Solitary confinement is the most common penalty inflicted in state prisons for rules violations. Bureau of Justice Statistics, U.S. Dept of Justice, Prison Rules Violators 6, Table 12 (Dec. 1989) (31% of punishments include solitary confinement). In Hawaii, solitary confinement is the most severe punishment imposed, and requires written approval of the administrator and periodic review of the inmate's

confinement if imposed for more than 60 days. Haw. Admin. R. § 17-201-19(a)(2). See full discussion of solitary confinement in Section IIIA, infra.

5. The Result In *Wolff* Of The Recognition Of Due Process Protections Before The Imposition Of Solitary Confinement Is Not Fortuitous.

None of the considerations set out by Chief Justice Rehnquist in *Payne v. Tennessee*, 501 U.S. 808 (1991), for overruling prior precedents are met in this case. In *Payne* the Court overruled two prior decisions, one 4 years old, *Booth v. Maryland*, 482 U.S. 496 (1987), and the other 2 years old, *South Carolina v. Gathers*, 490 U.S. 805 (1989), that the Eighth Amendment barred the admission of victim impact evidence during the penalty phase of a capital trial. The Court rejected *stare decisis* because it determined that application of the current rule turned on a "fortuity" in the facts of each case, rather than a reasoned distinction and was therefore

arbitrary. *Payne*, 501 U.S. at 828-29. Here there is no fortuity, the State of Hawaii adopted statutes and rules defining the substantive predicates and mandatory standards that govern the use of punitive segregation.

These provisions were assuredly reviewed by high level prison officials and probably by government attorneys as well. The criteria are set out with specificity and organized in different categories according to levels of seriousness of the violations. The disciplinary regulations became effective in 1983, well after this Court had established the rule for state created liberty interests. Adoption of the Hawaii statutes and regulations was a conscious, deliberate judgment of Hawaii's officials and not a fortuity arising in the facts of an individual case that would cause an arbitrary result. As argued above, the test of *Wolff* and its line of cases has not proven unworkable or unduly costly, which are other reasons identified by

Chief Justice Rehnquist in *Payne* for overruling past doctrine.

Justice Souter, in his concurrance, required a "special" justification to depart from precedent in constitutional cases. *Payne*, 508 U.S. at 842. This case presents no special justification. In considering the value of procedures in connection with use of solitary confinement, this Court has referred to the support for procedural safeguards by experts in penology and prison administration. "The creation of procedural guidelines to channel the decision making of prison officials is in the view of many experts in the field, a salutary development." *Hewitt*, 459 U.S. at 471. The doctrine of *stare decisis* supports the recognition of a state created liberty interest in this case.

III. PRISON DISCIPLINE LENGTHENS THE DURATION OF CONFINEMENT AND SERIOUSLY IMPACTS THE NATURE OF CONFINEMENT.

In *Wolff*, due process protections were required because solitary confinement is a

"major change in the conditions of confinement." *Wolff*, 418 at 572 n.19. Hawaii's punishing an inmate by confinement in disciplinary segregation both significantly worsens the conditions of confinement and may well lengthen the term of confinement.

A. Solitary Confinement Remains A Major Change In Conditions Of Confinement.

Solitary confinement today remains as serious a change in conditions of confinement as concerned this Court in *Wolff*. Prison officials have regularly used punitive segregation, or solitary confinement[1], as punishment for the most serious violations of prison rules, and have done so since the early nineteenth century. Mushlin, Rights of Prisoners 40 (1993). Solitary confinement, both punitive and administrative, is authorized in every American jurisdiction. Marin, Inside Justice 96 (1983). Solitary

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[1]Solitary confinement is also called isolation, disciplinary segregation and punitive segregation, but the prisoners simply know it as "the hole." Marin, Inside Justice at 95.

confinement is the most common penalty inflicted in state prisons for rules violations. Bureau of Justice Statistics, U.S. Dept of Justice, Prison Rules Violators 6, Table 12 (31% of punishments include solitary confinement).

Description of the often horrible conditions of solitary confinement could fill volumes. The deplorable conditions that have come to the attention of federal courts include no toilets, soap or showers; inadequate light and air; forcing to sleep on cold steel or concrete floor; and the presence of rats, mice and other vermin. Mushlin, Rights of Prisoners at 44-46. Solitary confinement and punitive segregation are normally intended as punishment. For that reason, the courts entertain challenges to the physical conditions of solitary confinement under the cruel and unusual punishment prohibition of the Eighth Amendment. See *Hutto v. Finney*, 437 U.S. 678 (1978).

Solitary confinement inflicts serious harms upon the inmates, even in the absence of brutal or unhygienic conditions. Mushlin, Rights of Prisoners 40. This Court, as early as 1890, recognized the serious harm that resulted to inmates from complete isolation:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160 (1890). Recent studies confirm the serious emotional consequences that result when isolation is used for discipline, even in the absence of unhygienic conditions. Luise, Note, Solitary Confinement: Legal and Psychological Considerations, 15 N.E. J. on Crim. & Civ. Confinement 301, 317 (1989) (discussing the literature that documents declines in mental

function and sometimes hallucination and delusions).

Solitary confinement is clearly a serious punishment. The American Correctional Association considers disciplinary segregation as a last resort punishment for serious violations, and may "only occur after an impartial hearing has established that there was a serious violation of conduct regulations and that there is no adequate alternative disposition to regulate the inmate's behavior." American Correctional Association, Standards for Adult Correctional Institutions 126 (1981). In Hawaii, solitary confinement is the most severe punishment imposed. Haw. Admin. R. § 17-201-19(a)(2). The rule Petitioner argues for would allow any inmate in the United States to be thrown into solitary confinement without any process at all.

B. Parole Authorities Must Be Able To Depend On The Accuracy Of Prison Disciplinary Decisions.

All parole authorities rely upon prison disciplinary records in parole decisions. Parole agencies must have confidence in the disciplinary decisions made by prison administrators. Permitting prison officials to impose discipline without a hearing, as argued by the Petitioner, will require parole decisionmakers to make release decisions based on inaccurate information.

No disciplinary hearings will degrade the quality of parole decisionmaking. Parole agencies will be required to assess an inmate's risk to society on the basis of untested, unverified, and possibly false information. Currently, when an inmate has been found guilty of a disciplinary infraction following a hearing, parole boards take the infraction as proven. Hawaii's regulations are typical. The Hawaii Paroling Authority may deny parole when the parole candidate has

been a management problem, "as evidenced by the inmate's misconduct record." Haw. Admin. R. § 23-700-33(b). While the petitioner argues that parole may be granted despite a record of misconduct, Pet. Br. at 10, the regulations do not provide any framework for the Paroling Authority to determine that the misconduct did not in fact occur as reported in the prison's records. Many jurisdictions, like Hawaii, will be required to make release decisions on the basis of inaccurate or incomplete information.

Parole is a well-established mechanism for the conditional release of inmates prior to the completion of their sentences Parole authorities currently operate in all fifty states, the District of Columbia, and the federal system.[2] As part of the parole

[2]In 1991, researchers from the Association of Paroling Authorities, International, surveyed all 50 states, the District of Columbia, and the United States Parole Commission. All jurisdictions responded and reported on their parole practices as of December 30, 1990. *See* Runda, Rhine & Wetter, The Practice of Parole Boards xii (1994). No jurisdiction stated that it did not have a parole authority.

process, every single one of these parole agencies considers inmates' prison disciplinary records. If parole officials are to rely upon prison disciplinary decisions, it is essential that those decisions be based upon proper evidence and regularized procedures.

Prison disciplinary records remain an important factor in contemporary parole decisionmaking, regardless of the structure of the parole determination. *See, e.g.*, 18 U.S.C. §§ 4206(a), 4207(1) (U.S. Parole Commission "shall consider" reports by prison staff, and may parole a prisoner if he "has substantially observed the rules of the institution or institutions where he has been confined"); 15 CAL. CODE REG. § 2281(c)(6) (circumstances tending to show unsuitability for parole include a record of serious misconduct in prison); 730 ILL. ANN. STAT. § 5/3-3-5(c)(3) (Smith-Hurd 1993) (board shall not parole inmate if release would have

substantially adverse impact on institutional discipline).[3]

A recent publication has just removed any possible uncertainty about the importance that parole boards place on prison disciplinary records. *See* Runda, The Practice of Parole Boards xii. Each parole board ranked the significance of certain factors in the parole decision process. The parole factors were assigned to one of five categories, from "considered and very important" to "not considered." *Id* at 11. One of the factors was inmates' "prison discipline record." *Id*, App. A. Of the fifty-two jurisdictions, twenty-three stated that "prison discipline record" was "considered and very important";[4]

[3]*See also* Special Committee on Correctional Standards, LEAA, Selected Correctional Standards, *reprinted in* W. Parker, Parole 204 (1972) (stating that parole board should have available report on inmate's institutional adjustment).

[4]Those jurisdictions were Alaska, Arizona, California, Florida, Kansas, Louisiana, Massachusetts, Maryland, Maine, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, Ohio, Rhode Island, South Carolina, Virginia, Vermont, Washington, Wisconsin, West Virginia and Wyoming. *Id.*

twenty-three stated that it was "considered and important";[5] and six stated that it was "considered and somewhat important."[6] Most significantly, *none* of the fifty-two jurisdictions said that prison discipline record was "considered but not important" or was "not considered." *Id.* Prison discipline impacts parole and lenghtens many inmate's terms in prison.

IV. THE ABILITY OF PRISON AUTHORITIES TO IMPOSE ADMINISTRATIVE SEGREGATION UPON INMATES DOES NOT REMOVE THE LIBERTY INTEREST OF INMATES IN AVOIDING PUNITIVE SEGREGATION.

Petitioner argues that the administrator's discretion to impose administrative segregation removes the liberty interest that the regulations create in an inmate remaining free from disciplinary

[5]Those jurisdictions were Alabama, Arkansas, Colorado, Connecticut, District of Columbia, Georgia, Iowa, Idaho, Indiana, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, New Jersey, New York, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas and Utah. *Id.*

[6]Those jurisdictions were Delaware, Hawaii, Illinois, Kentucky, Oregon and the U.S. Parole Commission. *Id.*

segregation. Pet. Br. at 45-47. The unstated premise of this argument is that administrative segregation imposes identical deprivations on inmates that disciplinary segregation imposes. To the contrary, this Court has recognized that disciplinary segregation imposes more severe deprivations on inmates. Then Justice Rehnquist recognized that disciplinary segregation was more severe than administrative segregation because: (1) the stigma of wrongdoing or misconduct attaches to punitive segregation, and (2) administrative segregation does not have an impact on parole. *Hewitt v. Helms*, 459 U.S. 460, 473 (1983).

Disciplinary segregation is distinct from administrative segregation because it is punishment and the inmate is subject to greater deprivations of liberty. Disciplinary segregation is solitary confinement imposed on an inmate for violations of prison rules, and is the last resort punishment for serious

rules violations. Haw. Admin. R. § 17-201-19. Administrative segregation is non-punitive in nature and may be imposed when an inmate is a risk to prison security. Haw. Admin. R. § 17-201-22. Disciplinary segregation is distinct from administrative segregation because it is punishment, and it impacts the duration of confinement as discussed in Section III, supra.

A. Disciplinary Segregation Is Punishment And Distinct From Administrative Segregation.

Petitioner argues that because Hawaii prison administrators have discretion to impose upon inmates administrative, non-punitive segregation, inmates cannot have a liberty interest in avoiding punitive segregation. However, this Court's jurisprudence concerning punishment has consistently rejected Petitioner's argument.

In *Allen v. Illinois*, 478 U.S. 364 (1985), petitioner Allen argued that he was entitled to the protection of the Fifth

Amendment's right not to incriminate himself in a proceeding under the Illinois Sexually Dangerous Persons Act. His argument was predicated upon the fact that a finding that he was a sexually dangerous person would result in his indefinite confinement in a maximum security state prison called the Menard Psychiatric Center ("Menard"). Other than a small number of other sexually dangerous persons, all of the inmates at Menard were convicted criminals who were serving sentences following felony convictions, and had been placed in Menard because its facilities for treating mentally ill inmates were better than those available in other Illinois prisons.

This Court rejected Allen's self-incrimination claim because it found that he was not being punished. In so doing the Court explained that the confinement was not punishment because it had not been shown to be inconsistent with the state's legitimate non-

punitive interest in treating him. That is, virtually identical forms of confinement may be classified as punitive or non-punitive based upon the government's intent. *Id* at 373.

Similarly, this Court has upheld pretrial detention of both juveniles and adults by focussing primarily on the purpose of confinement. *Bell v. Wolfish*, 441 U.S. 520 (1979); *Schall v. Martin*, 467 U.S. 253 (1984). Confinement is not punitive if "an alternative purpose to which [the restriction] may rationally be connected is assignable for it and [if it is not] excessive in relation to the alternative purpose assigned [to it]." *United States v. Salerno*, 481 U.S. 739, 747 (1987). This court has consistently held that preventing danger to others is a legitimate regulatory purpose for confinement which will not render confinement punitive for constitutional purposes. *Id; Wolfish; Allen.*

Thus, a prison, like the Halawa Correctional Facility, may impose segregation for a variety of legitimate regulatory, non-punitive purposes. But when a prison chooses to punish an inmate for violating prison rules, the Due Process Clause requires it to provide appropriate procedural protections. The logical result of the Petitioner's argument would be that since this Court permitted sexually dangerous persons to be confined in the Menard Psychiatric Center with criminal inmates who the state is punishing, *Allen*, 478 U.S. at 373, the criminal inmates would lose their rights under the Fifth Amendment. Similarly under the Petitioner's logic, this Court's holding that pretrial detention in *Salerno* and *Wolfish* was not punishment would permit the government to impose <u>punitive</u> confinement without a trial, so long as the defendants being punished are confined in the same facility as pretrial detainees. Since this Court in both *Salerno*

and *Allen* specifically relied upon the governments' representations that it had no intent to punish, it is doubtful that the Court intended to sanction such results.

<u>CONCLUSION</u>

The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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